Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1769

In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO THE PETITION OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

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Questions Presented.

Petitioner, Massachusetts Municipal Wholesale Electric Company (alternatively, "Petitioner" or "MMWEC") asserted several affirmative defenses in its initial pleadings including defenses based upon the Constitution. Petitioner failed to brief or otherwise refer to those constitutional defenses either before the trial court on a motion for summary judgment or before the Vermont Supreme Court on appeal. Petitioner did raise those defenses on a motion to reargue, which the Vermont Supreme Court denied.
The questions presented are:

(1) Whether the Court lacks jurisdiction to consider Petitioner's federal constitutional defenses because the decision below rests on the adequate and independent state ground that, pursuant to Vermont's rules of appellate procedure, Petitioner waived those defenses by failing to raise them at either the trial or appellate stage of this litigation;

(2) Whether the decision of the Vermont Supreme Court violates the takings clause where that decision adjudicated the contract rights of several private parties, did not involve seizure of property by the state, and was neither an unpredictable change in Vermont precedent nor an example of state parochialism; and,

(3) Whether the facially neutral decision of the Vermont Supreme Court violates the commerce clause where that decision merely sets forth rules of municipal and corporate governance, where there is no proof of discriminatory intent or discriminatory impact, no risk of inconsistent regulations among the states, and any incidental impact on interstate commerce is outweighed by the state's interest in prescribing the powers of its municipalities and corporations.

Affiliated Corporations.

Vermont Electric Cooperative, Inc. ("VEC") (Plaintiff below and Respondent herein) is the principal member of the Vermont Electric Generation and Transmission Cooperative, Inc.

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Respondent, Vermont Electric Cooperative, Inc., respectfully prays that the Court refuse to issue a Writ of Certiorari to review the judgment of the Supreme Court of Vermont entered on September 27, 1988, and made final by denial of a motion for reargument entered on January 30, 1989.

Jurisdiction.

As explained in more detail below, the Court lacks jurisdiction of this case because Petitioner's constitutional claims were not "specially set up or claimed. . ." within the meaning of 28 U.S.C. § 1257(a).[1] Instead, Petitioner's failure to assert its constitutional defenses on appeal before the Vermont Supreme Court constituted a waiver of those defenses. Consequently, the Vermont Supreme Court's refusal to hear reargument rests on adequate and independent state grounds. Thus, the Court lacks jurisdiction of this case.

Statement of the Case.

1. *INTRODUCTION.*

After MMWEC filed its answer in the action below, it appears to have made a strategic decision not to assert most of the numerous defenses which it had raised in that answer. Among others, MMWEC failed to press its tenth and twelfth defenses which purported to invoke the United States Constitution.[2] Instead, MMWEC chose to focus its case on what it refers to as "potentially dispositive grounds of state law" regarding the validity and enforceability of certain power sales contracts referred to in the Petition and herein as the "PSA's". Petition at 12.

Throughout the proceedings, MMWEC made not a

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[1]Petitioner erroneously cites to "28 U.S.C. § 1257(3)." Petition at 2. On June 27, 1988, however, § 1257 was amended to eliminate § 1257(1), (2) and (3) and replace it with § 1257(a) and (b). Supreme Court Case Selections Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). We assume Petitioner intends to rely on 28 U.S.C. § 1257(a) for jurisdiction.

[2]Petitioner's decision not to assert the defenses may have resulted from a change in counsel. Shortly after MMWEC's original counsel filed its answer asserting constitutional defenses, another law firm entered an appearance on behalf of MMWEC and assumed responsibility for the case. That firm retained responsibility through MMWEC's defeat in the Vermont Supreme Court. In its Petition for Certiorari, MMWEC has returned to its original counsel to resurrect certain of the constitutional defenses included in its original answer but abandoned for the rest of the proceedings below.

whisper about constitutional defenses. Indeed, after it won its case at the trial level, MMWEC clearly indicated, in its brief on appeal to the Vermont Supreme Court, that it had abandoned any reliance on federal constitutional defenses. It abandoned those claims with the knowledge that issues not briefed on appeal to the Vermont Supreme Court "must be deemed waived." Joint Brief of the Defendant Appellees on appeal to the Vermont Supreme Court at 20 (certain pages of which are attached as an Appendix, referred to hereafter as "VEC Appendix"). VEC Appendix at 3a. Only after Petitioner lost on dispositive state grounds in the Vermont Supreme Court did it seek on Motion for Reargument to resurrect certain of the constitutional issues it had repeatedly failed to raise throughout the entire course of the litigation below.

Petitioner couples this eleventh hour change in strategy with an unsubstantiated blast at the integrity of the Vermont Supreme Court. It now claims that the decision — written by that court's Chief Justice for a unanimous court — was a "wholesale desertion of legal and equitable responsibility for partisan benefit . . ." Petition at 16. Because MMWEC disagrees with the result — and for no other articulated reason — it contends that the Vermont judicial system acted with an unspoken bias in favor of "hometown contractual participants." This, of course, flies in the face of the fact — acknowledged by MMWEC in the Petition — that a substantial "majority of the Vermont participants themselves" vigorously maintained that the PSA's were valid and enforceable. Petition at 16; *See id.* at iii.

Indeed, MMWEC, along with five of the six original Vermont signatories to the PSA's, as well as the Vermont League of Cities and Towns as an *amicus curiae,* bombarded the Vermont courts with dire warnings that if the PSA's were voided: (1) current and future supplies of power for Vermont would be jeopardized; (2) the ability of Vermont's municipalities to issue bonds would be threatened; and, (3) everyone involved in the contracts would be plunged into a morass of securities fraud litigation. The Vermont Supreme Court explicitly rejected such arguments — as it

rejected arguments associated with the financial burden of the PSA's — in favor of a ruling based upon traditional and well understood principals of municipal and corporate governance.

Petitioner's cavalier aspersions regarding the motives of the Vermont Supreme Court is matched only by its superficial analysis of the decision itself. A fair reading of that decision leaves no doubt of the quality of that court's analysis. That court carefully considered the nature of the contracts involved and the legal ramifications of the massive delegation of authority and management responsibility envisioned by those contracts. As that court observed, the PSA's purported to delegate to MMWEC unlimited spending authority on behalf of the Vermont signatories to the PSA's. Given the absence of any legislative authority for such a delegation, fundamental notions regarding nondelegation of power of the municipal signatories and management authority of the cooperative signatories, virtually demanded a holding that the PSA's were *ultra vires* and void *ab initio*.

2. *MMWEC AND ITS CONTRACTS*

As indicated in the Petition, MMWEC is a joint action agency organized to meet the electric requirements of its member municipalities. Membership in the organization is limited to municipalities located in Massachusetts which — together with the governor of Massachusetts — chose its Board of Directors.

As a regulated joint action agency, MMWEC is empowered by the Massachusetts legislature to enter into power supply contracts with provisions which would not have been permissible under traditional notions of the common law. Thus, MMWEC's enabling legislation specifically provided that its power supply contracts "may contain provisions for . . . delegation and other matters deemed necessary or desirable to carry out its purposes." Mass. Gen. Laws Ann. Ch. 775, § 6(a)(iii) (West 1975). It is important to note, however, that while that legislation may have confered

authority on Massachusetts municipalities to delegate authority to MMWEC, the Massachusetts legislature could not confer such authority on Vermont entities.[3]

MMWEC's power supply contracts do provide for massive amounts of delegation of authority and responsibility to MMWEC. In essence, the PSA's represented an attempt by the several "participants" to acquire "indirect ownership" of proposed electric generation facilities (the "Project"). In return for a share in "project capability," the participants agreed to accept ultimate financial responsibility for the cost of their share of the Project. Full management responsibility over the Project and complete discretion with respect to financing the Project was vested in MMWEC. Complete decision making power over how much to spend on the Project and whether to continue or cancel the Project was delegated to MMWEC. Indeed, title to the Project was held solely in the name of MMWEC; thereby, denying the participants any of the indicia of control normally associated with ownership.

These and similar aspects of the PSA's systematically deprived the participants located in Vermont (the "Vermont Participants") of any opportunity to exercise their management responsibility on behalf of their members and municipal ratepayers. Of course, in Massachusetts there existed explicit legislative authority for the delegation. In Vermont, however, there was no such authority applicable to these contracts. Moreover, for the Vermont Participants this contractual delegation of authority and management responsibility was further exacerbated by: (1) the ineligibility of the Vermont Participants for membership in MMWEC, thus denying them an opportunity to influence the decisions of that entity; and, (2) the fact that financing by MMWEC was not subject to the authority of the Vermont Public Service Board which could have acted on behalf of the Ver-

[3]The Vermont legislature also granted power to delegate authority as "Special Power" to Vermont entities in the limited context of contracts with the Vermont Public Power Supply Authority, a Vermont entity similar in nature to MMWEC. Vt. Stat. Ann. tit. 30, § 5013 (1986 & Supp. 1988).

mont Participants.

Thus, for example, none of MMWEC's bond issuances in support of the Project were ever authorized or even submitted for consideration by the Vermont Participants. Similarly, the myriad of decisions associated with the continuation or cancellation of the Project were made wholly at the discretion of MMWEC. In short, MMWEC was granted full control of every conceivable aspect of the Project while the participants were unconditionally committed to pay whatever obligations MMWEC might chose to incur. These aspects of the PSA's were the focal point of the Vermont Supreme Court's decision.

3. *THE PROCEEDINGS BELOW*

MMWEC's contention that the decision by the Vermont Supreme Court was motivated by a desire to favor in-state parties over out-of-state interests is belied by the line up of the parties in the case. Of the six original Vermont Participants in the PSA's, five Vermont Participants actively argued that the contracts were valid and enforceable. Only VEC, although originally designated as a defendant, consistently maintained that the PSA's impermissibly delegated to MMWEC management responsibility statutorily vested in the VEC Board of Trustees. In addition, the Village of Stowe intervened in the case as an indirect participant in the PSA's. *See,* Brief of Appellee Village of Stowe in Opposition to the Petition of MMWEC at 1.[4]

In response to the Complaint for Declaratory and Injunctive Relief filed by the Vermont Department of Public Service, VEC filed an Answer and Affirmative Claims for Declaratory Relief. In its Affirmative Claims for Declaratory Relief, VEC sought a declaration with respect to: (1) whether VEC had the corporate authority to enter

[4]Shortly prior to the issuance of the decision by the Vermont Supreme Court, the Washington Electric Cooperative filed documents indicating that it had decided to realign its party status before that court from party appellee to party appellant.

into the PSA's; (2) whether the PSA's had required prior approval by the Vermont Public Service Board; and, (3) whether an amendment to the PSA's entitled "Agreement for Additional Participants Share" had required notice to the Vermont Public Service Board pursuant to General Order No. 45.[5]

Although the foregoing issues were fully litigated in the Vermont Courts, MMWEC never interposed an answer to the affirmative claims of VEC; nor did it ever seek to interpose defenses under the United States constitution to VEC's claims. In this regard it should be noted that the constitutional defenses which were raised by MMWEC pertain specifically to "the conduct of the Vermont Department of Public Service by prosecution of the . . . litigation . . ." Petition at 56(a) - 58(a). At no point in the litigation did MMWEC seek to interpose constitutional defenses to the action by the private parties to the litigation. Indeed, at no point until after the decision of the Vermont Supreme Court did MMWEC refer to the constitutional defenses originally directed at the conduct of the Vermont Department of Public Service.

MMWEC's failure to raise or even refer to the existence of defenses under the United States constitution is especially egregious in light of the assertion briefed by the Department of Public Service in its Brief as Appellant before the Vermont Supreme Court at 96-111 that, "This Court must grant complete summary judgment invalidating the Project 6 Agreements because all of the defendants' affirmative defenses fail as a matter of law."

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[5]MMWEC contends in its Petition at 9-10 that the PSA's were "approved" by the Vermont Public Service Board under its General Order No. 45. The passage is misleading and involves a mischaracterization of the actions taken by the Vermont Public Service Board regarding the filings which were made with respect to the PSA's. The Petition also neglects to reflect the fact that MMWEC failed to comply with General Order No. 45 with respect to the "Agreement for Additional Participants Share" referred to in the text. Most importantly, however, MMWEC's assertions regarding General Order No. 45 are irrelevant because it was not necessary for the Vermont courts to reach the contentions of any party pertaining to General Order No. 45.

Although the appeal before the Vermont Supreme Court expressly invited assertion of Petitioner's constitutional defenses, Petitioner studiously avoided raising their existence in its response to the appeal. Indeed, in several portions of its brief on appeal to the Vermont Supreme Court, MMWEC's avoidance of its alleged constitutional defenses broaches upon an affirmative disavowal of their existence. First, MMWEC failed to refer to its constitutional defenses in its statement of "Claims, Affirmative Defenses and Related Case." VEC Appendix at 2a. It also failed to identify its constitutional defenses as a basis for remand or as issues to be addressed if the Vermont Supreme Court failed to affirm the lower court's decision:

> Certain issues that have been briefed by the DPS were not reached by the trial court and need not be reached by this Court if it affirms the judgment below.[19] If this Court does not affirm the judgment, the case should be remanded for determination by the trial court of the issues not previously addressed.
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> * * *
>
> [19]These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC [Washington Electric Cooperative].

VEC Appendix at 3a-4a. Similar language is found at page 66 of MMWEC's Brief on Appeal to the Vermont Supreme Court. VEC Appendix 5a.

MMWEC was well familiar with the Vermont rule that issues — even constitutional issues — not briefed before

the Vermont Supreme Court are waived. Thus, it argued in the same brief:

> A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18]
>
> * * *
>
> [18]These include various state and federal constitutional claims as well as the contention that the PSA's conflict that 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates.

VEC Appendix at 3a.

4. *THE DECISION OF THE VERMONT SUPREME COURT*

The unanimous decision issued by the Vermont Supreme Court was written by the Honorable Frederic W. Allen, Chief Justice. Also on the panel was the Honorable Albert W. Barney, Chief Justice (Ret.). In reaching its decision, the Vermont Supreme Court acknowledged the attempts of all parties to interject considerations of matters unrelated to the legal issues. Petition at 22a-23a. For example, the Vermont League of Cities and Towns submitted a brief *amicus curiae* asserting — as did the defendants — that invalidation of the contracts would create serious doubts about the borrowing authority of Vermont municipalities. Similarly, the defendants had raised the specter of massive securities fraud lawsuits. The Vermont Supreme Court responded appropriately:

> We are no more influenced by these considerations that [sic] we are by plaintiffs' emphasis on the immensity of the financial burden imposed by the agreements or by the fact that no power has yet been produced — and may never be produced — by the project. Our Courts are courts of law and will deal with the legal ramifications resulting from our holding; policy considerations are for the legislature.

Appendix at 23a.

The decision of the Vermont Supreme Court was firmly rooted in long recognized principals of law pertaining to the extent to which municipalities and cooperatives may delegate to others — such as MMWEC — powers and responsibilities conferred by law upon their duly elected representatives. These are issues particularly with the province of state courts. These were the issues on which MMWEC chose to litigate the case. Having lost on those issues, it seeks yet another forum with other issues. Indeed, as discussed below, even those issues do not merit consideration by this Court.

Reasons for Denying the Writ.

For the following reasons the Court should deny the writ.

I. THE COURT LACKS JURISDICTION TO CONSIDER THE PETITIONER'S CONSTITUTIONAL DEFENSES BECAUSE PETITIONER FAILED TO RAISE AND PRESERVE THOSE DEFENSES BELOW.

The Vermont Supreme Court denied MMWEC's Motion for Reargument, which raised constitutional defenses, because MMWEC failed to raise or brief those defenses at any stage of the litigation subsequent to the initial pleadings. Indeed, as indicated above, it never interposed the defenses to the pleadings filed by VEC. In fact, MMWEC not only failed to refer to those defenses, but actually abandoned them in its brief an appeal to the Vermont Supreme Court. That omission deprived the state court of an opportunity to consider MMWEC's alleged defenses in the context of the other issues before it. Consequently, the court below concluded that MMWEC had waived its constitutional defenses because MMWEC failed to identify issues that it had previously raised but which that court previously overlooked or misapprehended. This Court has held that such a basis for a decision constitutes an adequate and independent state ground. Because the decision below

rests on an adequate and independent state ground, this Court lacks jurisdiction to consider the Petition.

A. *This Court Should Not Exercise Jurisdiction Over the Lower Court's Decision Because it Rests on Adequate and Independent State Grounds*

It is well settled that this Court will not review a state court decision that rests on adequate and independent state grounds. *Johnson v. Mississippi,* 108 S.Ct. 1981, 1987 (1988); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 129 (1945) (Frankfurter, J.).[6] Instead, the Court's review is limited to the adequacy and independence of the state ground. *See Street v. New York,* 394 U.S. 576, 583-85 (1969)(Harlan, J.); *Radio Station WOW,* 326 U.S. at 129.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-97 (1981). The record in this case does not meet the *Webb* burden; the federal claim was not adequately presented before the court below. That want of presentation formed the independent state

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[6]Less settled is whether the issue is a jurisdictional or a prudential restriction on the Court's power of review. While some cases indicate that the issue is jurisdictional, *see Exxon Corp. v. Eagerton,* 462 U.S. 181 n.3 (1983); *Webb v. Webb,* 451 U.S. 493, 496 (1981); *Beck v. Alabama,* 447 U.S. 625, 647-48 (1980)(Rehnquist, J., dissenting); *Street v. New York,* 394 U.S. 576, 581-82 (1969); *Bryant v. Zimmerman,* 278 U.S. 63, 66-69 (1928); other cases indicate the issue may be prudential, *see Heath v. Alabama,* 106 S.Ct. 433, 436-37 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-24 (1983)(Rehnquist, J.). The Court need not decide here whether the issue is jurisdictional or prudential. Instead, assuming the issue is prudential, the Court ought to exercise its discretion to deny review. Several factors would support such an exercise of discretion. Foremost, "the rule [demanding preservation of claims] guarantees that a factual record will be available to [the Court] . . ." *Gates,* 462 U.S. at 224. Further, MMWEC has not satisfied the "presumption against review" of claims not "pressed or passed upon in the state court . . ." *Heath,* 106 S.Ct. at 436-37.

ground upon which the court below based its decision.

The Vermont Supreme Court's independent state ground for denying MMWEC's motion to reargue was adequate. The Vermont Supreme Court refused to consider MMWEC's constitutional defenses because MMWEC failed to assert those defenses prior to its motion to reargue, beyond inclusion in the initial pleadings with numerous other defenses. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here. . ." *Prudential Federal Savings and Loan Ass'n v. Flanigan,* 478 U.S. 1311, 1311 (1986) (quoting *Radio Station WOW,* 326 U.S. at 128).

In *Radio Station WOW,* the petitioner raised federal claims in its initial pleadings, but did not raise those claims again until its motions to dismiss and for rehearing before the Nebraska Supreme Court. *Id.* at 128. This Court affirmed the Nebraska Supreme Court's refusal to hear the federal claims for the first time: "But it is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue." *Id.* at 129. *See also Prudential Federal Savings & Loan Ass'n,* 478 U.S. at 1311 ("The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation"); *Bloeth v. New York,* 82 S.Ct. 661, 662 (1962) (Harlan, J.) (Court denied stay of execution pending petition for certiorari because "this Court would be without jurisdiction . . ." where issue was not raised until second motion for reargument). *Radio Station WOW* and its progeny precludes this Court from reviewing the decision below.

Radio Station WOW reveals that, although a state court may not foreclose consideration of properly asserted constitutional claims, a state court may refuse to consider claims not properly asserted. Petitioner fails to squarely address this issue. In fact, MMWEC completely fails to address the precise issue before the Court; none of the cases it cites considers whether a state court litigant, which failed to assert its federal claims until its motion to reargue, properly

asserted those claims below. *See Laurence v. State Tax Comm'n,* 286 U.S. 276 (1932); *Ward v. Love County,* 253 U.S. 17 (1920); *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464 (1918); and, *Enterprise Irrigation District v. Farmers' Mutual Canal Co.,* 243 U.S. 157 (1917).

Similarly, each of the cases MMWEC cites regarding arbitrary state procedural bars misses the mark. The instant case does not involve: (1) an inconsistently applied standard, *Sullivan v. Little Hunting Park,* 396 U.S. 229, 233-34 (1969); (2) a discretionary state briefing rule actually complied with, *NAACP v. Alabama,* 377 U.S. 288, 297-298 (1964); (3) an issue raised below, but not in accordance with a newly stated rule of briefing, *Wright v. Georgia,* 373 U.S. 284, 288-91 (1963); (4) an "arid ritual of meaningless form," *Staub v. Baxley,* 355 U.S. 313, 320 (1958); (5) waiving federal claims by substituting appearance and adopting predecessor's answer, *Davis v. Wecksler,* 263 U.S. 22, 24 (1923); (6) state procedure not regularly followed, *Barr v. City of Columbia,* 378 U.S. 146, 149 (1964); or, (7) an attempt to correct a failure to certify record below, *Parrot v. City of Tallahassee,* 381 U.S. 129, 129 (1965).

Even MMWEC's sole case regarding waiver is easily distinguished. In *Douglas v. Alabama,* 380 U.S. 415 (1965), defense counsel objected three times to the prosecutor reading a confession before the jury. *Id.* at 421. After the second objection, the prosecutor assured defense counsel that further objection was not necessary. *Id.* at 421-22. The Alabama Court of Appeals refused to consider defense counsel's argument because there was no ruling sought and acted on. *Id.* at 421. This Court held that:

> "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here. . . No legitimate state interest would have been served by requiring

> repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair."

Id. at 422. This is not such a case.

Unlike the defense counsel in *Douglas,* MMWEC had several opportunities to bring its constitutional defenses to the attention of the state courts, but silently allowed those opportunities to pass by. Indeed, as discussed *infra* at 17-18, MMWEC failed to assert its constitutional defenses in its brief on appeal before the Vermont Supreme Court. In that same brief, MMWEC: (1) correctly asserted that a Respondent's failure to raise constitutional issues constituted a waiver of those issues; and, (2) actively sought to preserve issues other than the constitutional defenses it now asserts. Consequently, MMWEC failed to bring its constitutional defenses to the attention of the court below and "enable it to take appropriate corrective action. . . ." *Douglas* at 422.

As explained below, Vermont rules of practice deem MMWEG's silence to be a waiver of its constitutional defenses. Those rules of practice are longstanding, mandatory, regularly and consistently followed, and relatively easy to comply with. Consequently, there is no indication that the Vermont Supreme Court denied MMWEC of due process when it refused to consider constitutional claims waived below.

B. *Petitioner Waived its Constitutional Defenses By Failing to Comply with Vermont's Fair and Reasonable Requirement of Preserving Issues for Appeal*

Petitioner waived its Constitutional defenses by failing to mention them in its brief in opposition to Respondents' appeal before the Vermont Supreme Court. By the stan-

dards of at least half the states,[7] including Vermont, failure to raise issues in appellate briefs constitutes a waiver. In addition, MMWEC's neglect of its constitutional defenses throughout this litigation demonstrates MMWEC's intention to abandon those defenses. Vermont rules do not allow MMWEC to resuscitate those claims in a motion to reargue.

It is no mystery to MMWEC that Vermont's rules of practic require a litigant to preserve claims on appeal by presenting those claims in briefs before the Vermont Supreme Court. *See infra* at 18. Thus, Vermont's high court has repeatedly found that issues not briefed on appeal are waived. *See R. Brown & Sons, Inc. v. International Harvester Corp.*, 142 Vt. 140, 142, 453 A.2d 83, 84 (1982); *In re Smith, Bell & Hauck Real Estate, Inc.*, 132 Vt. 295,

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[7] *See Holsonback v. Holsonback*, 518 So.2d 146, 148 (Ala. Civ. App. 1987); *Rosson v. Boyd*, 727 P.2d 765, 767 n.6 (Alaska 1986); *Burks Motors, Inc. v. International Harvester Co.*, 250 Ark. 641, ____, 466 S.W.2d 943, 947 (Ark. 1971); *In re Keil, 51 Del. 351, ____, 146 A.2d 398, 399 (Del. 1958); Sarmiento v. State of Florida*, 371 So.2d 1047, 1053 (Fla. Dist. Ct. App. 1979); *Deller v. Smith*, 250 Ga. 157, ____, 296 S.E. 2d 49, 53 (Ga. 1982); *Waters v. Double L, Inc., 114 Idaho* 256, ____, 755 P.2d 1294, 1305-06 (Idaho Ct. App. 1988), *modified*, 115 Idaho 705, 769 P.2d 582 (Idaho 1989); *Village of Mundelein v. Taylor*, 130 Ill. App.3d 819, ____, 474 N.E.2d 843, 847 (Ill. App. Ct. 1985); *Daviess-Martin County Rural Telephone Corp. v. Public Service Comm'n*, 132 Ind. App. 610, ____, 175 N.E.2d 439, 440 (Ind. App. 1961); *Herrick v. Wills*, 333 S.W.2d 275, 276 (Ky. 1959); *Bank of New Orleans and Trust Co. v. H.P.B., Jr. Development Co., Inc.*, 427 So.2d 486, 492 (La. Ct. App. 1983); *Samuels v. Illinois Fire Insurance Co.*, 354 S.W.2d 352, 363 (Mo. Ct. App. 1962); *In re Lorring*, 75 Nev. 330, ____, 349 P.2d 156, 157 (Nev. 1960); *Sanchez v. Dale Bellamah Homes of New Mexico, Inc.*, 76 N.M. 526, ____, 417 P.2d 25, 28 (N.M. 1966); *Lowe v. Tarble*, 313 N.C. 460, ____ n.5, 329 S.E.2d 648, 651 n.5 (N.C. 1985); *Alessandro v. Board of Liquor Control*, 105 Ohio App. 521, ____, 153 N.E.2d 174, 174-75 (Ohio Ct. App. 1957); *Brown v. State Election Board*, 369 P.2d 140, 140 (Okla. 1962); *Weyerhaeuser Co., Inc. v. United Pacific Insurance Co.*, 83 Or. App. 556, ____, 732 P.2d 921, 922 (Or. Ct. App. 1987); *AT&T v. Board of Property Assessment*, 10 Pa. Commw. 41, ____, 309 A.2d 193, 195 (Pa. Commw. Ct. 1973), *rev'd on other grounds*, 461 Pa. 716, 337 A.2d 844 (1975); *Brimbau v. Ausdale Equipment Rental Corp.*, 120 R.I. 670, ____, 389 A.2d 1254, 1255 (R.I. 1978); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, ____, 322 S.E.2d 17, 19-20 (S.C. Ct. App. 1984); *Alexander v. Patrick*, 656 S.W.2d 376, 377 (Tenn. Ct. App. 1983); *Langston v. Eagle Publishing Co.*, 719 S.W.2d 612, 625 (Tex. Ct. App. 1986); *Martinson v. North Central Life Insurance Co.*, 65 Wis.2d 268, ____, 225 N.W.2d 604,604 (Wis. 1975); *State Board of Equalization v. Jackson Hole Ski Corp.*, 745 P.2d 58, 60 (Wyo. 1987).

300, 318 A.2d 183, 187 (1974); *Hilder v. St. Peter,* 144 Vt. 150, 165, 478 A.2d 202, 211 (1984). Petitioner's omission was fatal.

Vermont's requirement that all issues be preserved in the appellate briefs has been codified by the rule of appellate procedure that a litigant may not reargue an issue not briefed on appeal:

> The motion [for reargument] shall state with particularity the points of law or fact, *presented in the briefs upon the original argument,* which in the opinion of the moving party the Court has overlooked or misapprehended and which would probably affect the result.

V.R.A.P. Rule 40 (motions for reargument) (*emphasis added*). Consequently, Vermont's high court will not grant a motion to reargue on a ground not presented in the original brief on appeal. *Champlain Valley Exposition, Inc. v. Village of Essex Junction,* 131 Vt. 449, 457, 309 A.2d 25, 30 (1973) (court will not "re-examine an issue already fully decided using a new theory not presented in the briefs upon the original argument."); *Norman v. American Woolen Co.,* 117 Vt. 28, 36, 84 A.2d 125, 130 (1951) ("purpose of a motion for reargument is to point out matters presented in the brief and relied upon in the original argument which is thought were overlooked or misapprehended by the court reviewing the case . . . New questions are not for consideration . . .").

Petitioner's failure to brief its constitutional defenses on appeal before the Vermont Supreme Court was consistent with its neglect of those defenses throughout this litigation. The record reflects that, following the initial pleadings, MMWEC abandoned its constitutional defenses.[8] First,

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[8]Petitioner's waiver at the trial level was not necessarily fatal. Vermont allows an exemption for first time review of constitutional issues on appeal where those issues are "so grave and serious that [they] strike at the heart of the [appellant's] constitutional rights," *In re Maher,* 132 Vt. 560, 562, 326 A.2d 142, 144 (1974), or where the appellant poses an "argument which, if accepted, would result

(footnote continued on next page)

MMWEC failed to preserve its rights with respect to those defenses before the trial court by presenting neither evidence nor legal arguments related to those defenses. Contrast MMWEC's neglect with actions taken by certain defendants designated below as the "Villages and WEC" to preserve their defenses. For example, the Villages and WEC conditionally executed a stipulation of facts which formed the basis of the motions for summary judgment below. They conditioned their execution on the preservation of their right to further litigate their affirmative defenses. Petitioner, on the other hand, joined in that stipulation of facts unconditionally. Second, the Villages and WEC took the added precaution of asserting in their summary judgment brief that they "expect to further develop additional defenses which have not been briefed . . . including constitutional issues." Petitioner took no such precaution.[9]

Finally, and perhaps most telling, in its brief before the Vermont Supreme Court, MMWEC completely abandoned any right it may have had to assert its constitutional defenses. First, MMWEC enumerated for the court below the "remaining claims, which have not been adjudicated . . ." But, MMWEC did not include its constitutional defenses as "remaining claims," implicitly because it no longer sought to assert them. VEC Appendix at 2a. Similarly, MMWEC's constitutional defenses were not among those issues for which MMWEC sought conditional remand: "These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC". VEC Appendix at 4a. *See* VEC Appendix at 5a.

(footnote continued from previous page)
in a finding that [appellant's] constitutional rights had been seriously abridged." *In re Raymond,* 137 Vt. 171, 175, 400 A.2d 1004, 1006 (1979). Application of this exemption, however, is "rare and extraordinary." *Id.* Despite this opportunity, MMWEC failed to argue before the Vermont Supreme Court that a "rare and extraordinary" circumstance allowed first time review of its claims an appeal.

[9]The constitutional issues Villages and WEC sought to preserve were distinct from the defenses MMWEC now asserts.

In the same document, MMWEC correctly argued that issues not briefed "must be deemed waived": "A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18]" *Id.* at 3a. Footnote 18 reads as follows: "These include various state and federal constitutional claims as well as the contention that the PSA's conflict with 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates." *Id.* MMWEC was aware of Vermont's preservation rules, chose to apply those rules to other litigants and chose not to preserve its own constitutional defenses. Petitioner thereby effected a waiver of its constitutional defenses.

The record reflects that the Vermont Supreme Court denied MMWEC's motion to reargue its constitutional defenses because MMWEC waived those defenses. Vermont's rules of waiver support such a conclusion. In any event, this Court assumes that, where a state's highest court refuses to hear a claim, the reason is want of proper presentation of that claim. *Exxon Corp. v. Eagerton,* 462 U.S. at 181 n.3. Petitioner has not met its burden to show the contrary. *Id.*

It appears from the foregoing that under Vermont rules of practice MMWEC waived its constitutional defenses. The Vermont Supreme Court denied the motion for reargument on that basis. Further, that independent state ground is quite adequate. The Vermont rules of waiver are longstanding, mandatory, regularly and consistently followed, and relatively easy to comply with. Those rules are followed by at least half of the country's jurisdictions. Despite ample opportunity to assert its constitutional defenses, MMWEC scuttled each chance it had. The court below, following its well settled rules, refused to allow MMWEC to raise those sunk defenses from the deep. Petitioner now would have this Court believe that it lacked an opportunity to brief those defenses. Petitioner cannot have it both ways; it cannot now claim it was denied of that which it consistently rejected.

II. Petitioner's Federal Constitutional Claims Are Not Substantial And Therefore Are Not Worthy Of Consideration By The State Court System Or By This Court.

The facially neutral decision below constituted a violation of neither the takings clause nor the commerce clause. That well reasoned decision was neither a sudden and unpredicatable change in Vermont precedent nor a mere example of state parochialism. Instead, the Vermont Supreme Court merely adjudicated the contract rights of several private parties. Further, the court's legitimate interest, to set forth rules of municipal and corporate governance, far outweighed any incidental impact on interstate commerce. Consequently, MMWEC presents no constitutional claims worthy of the Court's review.

A. *The Decision of the Vermont Supreme Court Voiding the Contracts did not Constitute a Deprivation of Property in Violation of the Due Process Clause of the Fourteenth Amendment*

A decision of a state court that resolves a contractual dispute between private individuals will not result in a taking of property in violation of the Fifth Amendment.[10] *See Chicago, Burlington & Quincy R. Co. v. Chicago,* 166 U.S. 226, 241 (1897) (state court judgment interfering with private property rights for a *public use,* without compensation, is a taking); *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450 (1924) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away

[10]Petitioner, in its pointheading, couches its takings argument in terms of the Fourteenth Amendment. Petition at 14. Nonetheless, the body of MMWEC's takings argument does not assert that it lacked notice and an opportunity to be heard. Instead, the gist of MMWEC's takings argument is that it was deprived of property in violation of the Fifth Amendment. This is borne out by the cases MMWEC cites, and MMWEC's focus on the Fifth Amendment implications of the Vermont Supreme Court's action, such as the public purpose and economic impact of that action. *See* Petition at 15-16.

his property without due process of law.''); *Corporation of the Presiding Bishop v. Hodel,* 637 F. Supp. 1398, 1407 (D.D.C. 1986), *aff'd* 830 F.2d 374, *cert. denied,* 108 S.Ct. 1752 (1988) (takings clause is not implicated where a court is adjudicating rights between private parties). A state court resolving a contractual dispute between private parties does not take property. Instead, the court engages in the process of ''analyzing precedent and other rules and declaring the rights of the parties.'' *Hodel,* 637 F.Supp. at 1407.

> Only where the property is taken by a court for the public . . . is the takings clause implicated. It is not implicated where a court is refereeing a title dispute between two private parties. . . Courts do not ''take'', they declare. If they were said to ''take'', they could not effectively declare.

Id. (citations omitted)(quoting Chang, *Unravelling Robinson v. Ariyoshi: Can Courts ''Take'' Property?,* 2 HAWAII L. REV. 57 (1979)).

There was no ''taking'' because the Vermont Supreme Court did not seize private property on behalf of the state. Petitioner even concedes this: ''[t]he action is not an adjustment of benefits and burdens in the common good . . . .'' Petition at 15-16. Instead, the court merely adjudicated and declared the rights of private individuals. Consequently, the Vermont Supreme Court's adjudication of the rights of MMWEC, VEC and the other private parties could not have risen to a taking.

One exception to the rule that a state court adjudicating private contract rights cannot violate the takings clause is where the state court's decision ''constitutes a sudden change in state law, unpredictable in terms of the relevant precedents.'' *Hughes v. Washington,* 389 U.S. 290, 296-98 (1967) (Stewart, J., concurring) (sudden reversal of established precedent ''effected an unforeseeable change'' in state's property law). Even then, the court's action ''must be gross and obvious, coming close to the boundary of ar-

bitrary action." *Roberts v. City of New York,* 295 U.S. 264, 277 (1935) (purported valuation error in condemnation trial did not violate due process). The action of the court below did not approach this standard and the Petition provides this Court with no factual basis or legal analysis, beyond MMWEC's conclusory assertions, for concluding that it did.

Indeed, Vermont has long held that contracts entered into without corporate authority are void *ab initio.* This is reflected in the authority which the Vermont Supreme cites, Petition at 23a, as well as other cases. *See Ives v. Wallingford,* 8 Vt. 224, 230, (1836) (town not liable where contract entered into in excess of statutory authority); *Metropolitan Stock Exchange v. Lyndonville Nat'l Bank,* 76 Vt. 303, 308, 57 A. 101, 102 (1904) (*ultra vires* contracts are void and not merely voidable); *Wing Memorial Hospital Assn. v. Randolph,* 120 Vt. 277, 285-286, 141 A.2d 645, 651 (1957)(contract not *ultra vires* where "made in the performance of the very governmental function entrusted to the overseer as a public official of the town government"). Therefore, there was no unpredictable and sudden change in state law. In any event, any jurisprudential flaws that MMWEC contends may exist in the decision below do not rise to the level of a constitutional violation. *See Hughes,* 389 U.S. at 296-98; *Roberts,* 295 U.S. at 277.

Moreover, MMWEC fails to point to any state action that can be considered a "taking", other than the mere rendering of an adverse decision. Simply put, MMWEC fails to analyze, factually or legally, how the state took private property for a public use. Instead, MMWEC merely sets out this Court's takings standard, then alleges some facts that remotely relate to that standard. The gist of MMWEC's argument is that the decision of the Vermont Supreme Court: (1) was poorly reasoned; (2) had a large economic impact; and, (3) interferes with investors' expectations. Even assuming that MMWEC had provided this Court with a reasoned analysis to support its argument, it still would not be enough. Adjudication of private contract rights will almost always allow the losing party to assert such an argu-

ment. But surely not every adjudication of private contract rights results in a taking.[11]

The cases MMWEC cites in support of its takings claim do not consider whether a state court's adjudication of private rights can result in a taking. All but one of those cases consider the constitutionality of legislative or executive action, not judicial action. Even *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), MMWEC's only case concerning court action, is inapposite. In *Webb's,* the Court considered whether a state court violated the Fifth Amendment by keeping interest earned on an interpleader fund. *Id.* at 159-160. The Court found that the lower court's action amounted to a transformation of private into public property. *Id.* at 164-65. Because retention of the money had no police power justification, the deprivation constituted a taking. *Id.* at 163-64.

In any event, the record does not support MMWEC's claim that the Vermont judiciary sought to shift a public burden to a private individual. Significantly, the trial court's decision was in MMWEC's favor and was, therefore, hardly an example of state parochialism. Further, contrary to MMWEC's assertion, Petition at 16, the court's opinion has a firm basis in established jurisprudence. The court based its decision, in part, on an interpretation of the statutes which granted Respondents authority to enter into power sales agreements. Petition at 8a. The court also based its decision on deep rooted concepts of non-delegation and avoidance of contracts for lack of authority. Petition at

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[11]Even if the lower court's action is within the parameters of the takings clause, MMWEC did not possess any property rights capable of being extinguished. The court held that the PSA's were void *ab initio,* meaning, in effect, they never existed. Petition at 23a. Consequently, MMWEC never had any property capable of being taken. This question of property rights is, of course, a matter of state law, demanding deferrence. *Webb's Fabulous Pharmacies, Inc.,* 449 U.S. at 161. It is axiomatic that there can be no taking if the aggrieved party had no property rights capable of being taken.

Petitioner's failure to raise its constitutional defenses below deprived the Vermont courts of an opportunity to adjudicate the foregoing issue of state law in the context of the takings clause. *See supra* note 6 regarding the value of allowing state courts an opportunity to consider constitutional claims.

11a-22a. The court did not consider the benefits that would accrue to Vermonters, other than that "non-enforcement of illegal contracts is a matter of common public interest. . ." Petition at 23a. Further, the mere fact that the court analogized to other jurisdictions' case law hardly impacts the soundness of its decision. An inability to set precedent in reliance upon persuasive authority would forever preclude progression of Vermont's jurisprudence.

B. *The Facially Neutral Decision of the Vermont Supreme Court Neither Discriminates Against nor Impermissably Impacts Upon Interstate Commerce*

The facially neutral decision of the Vermont Supreme Court does not offend the Commerce Clause. *CTS Corporation v. Dynamic Corporation of America,* 107 S.Ct. 1637, 1648-49 (1987) (state's anti-takeover statute restricting voting rights not discriminatory because it regulates without regard to citizenship); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471-472 (1981)(statute prohibiting sale of milk in plastic containers not discriminatory despite a detrimental impact on foreign plastic container suppliers); *Exxon Corp. v. Maryland,* 437 U.S. 117, 125-126 (1978). (statute prohibiting gasoline producers or refiners from operating retail service stations not discriminatory despite happenstance that all the gasoline refiners and producers were foreign corporations).

A state law is not discriminatory unless there is proof of either discriminatory intent or discriminatory effect. *Clover Leaf,* 449 U.S. at 471 n.15. Beyond MMWEC's conclusory assertions, there is no basis presented in the Petition for such a conclusion. The Vermont Supreme Court's opinion lacks even a hint of discriminatory intent. The decision is a facially neutral determination of the Vermont rules of municipal and corporate governance. Those rules evenhandedly affect both domestic and foreign interests. The court rendered its decision without regard to the litigants' citizenship and without parochial or protectionist intent.

Moreover, the court's decision has no discriminatory impact on interstate commerce. Foreign corporations may continue to enter into power sales agreements in Vermont, provided that the Vermont municipality or corporation acts within its statutory limits. The lower court's opinion "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies . . ." *Exxon Corp.* 437 U.S. at 126. Therefore, there is no impermissable barrier to interstate trade.

Petitioner cannot demonstrate the obvious protectionist intent or impact that was clearly present in several of the cases that it cites. *See New Hampshire Power Co. v. New Hampshire,* 455 U.S. 331, 339 (1982) ("The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of . . . customers in neighboring states."); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n,* 772 F.2d 404, 416 (8th Cir. 1985)(the commission's "apparent concern, which has been made abundantly plain in its orders and its arguments. . .is the economic impact on Arkansas citizens. . . ."); *American Trucking Ass'n, Inc. v. Scheiner,* 107 S.Ct. 2829, 2841 (1987)(axle tax that imposes a cost on foreign trucks "approximately five times as heavy as the cost per mile borne by local trucks. . .are plainly discriminatory."); *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 445 (1978) ("regulations impose a substantial burden on the interstate movement of goods").[12]

Further, the court's decision does not rise to a commerce clause violation because it establishes a rule of municipal and corporate governance that does not risk "subjecting activities to inconsistent regulations. . ." among the states. *CTS,* 107 S.Ct.at 1649. Instead, the decision only regulates the authority of Vermont municipalities and corporations. In *CTS,* the Court rejected the argument that a state's anti-

[12]Petitioner's citation to *Tri-State Generation & Transmission Ass'n v. Public Service Commission,* 412 F.2d 115 (10th Cir. 1969) is curious. In that case, the Tenth Circuit issued an injunction because of the court's long delay and "dereliction." *Id.* at 119 (Murrah, C.J., dissenting).

takeover regulation created an unconstitutional risk of inconsistent regulations: "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." *Id.* at 1649. Similarly, because the lower court's decision regulates only the authority of Vermont municipalities and corporations, it does not run afoul of of the *CTS* rule.

Finally, the decision below does not violate the Commerce Clause because it "regulates evenhandedly to effectuate a legitimate local public interest . . . , its effects on interstate commerce are only incidental. . ." and MMWEC cannot demonstrate that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Northwest Central Pipeline Corp. v. State Corp. Comm'n,* 109 S.Ct. 1262, 1282 (1989)(quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 177, 142 (1970)).

The decision below passes muster under the *Pike* balancing test. As discussed above, the decision regulates evenhandedly. Further, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations. . . ." *CTS,* 107 S.Ct. at 1649. In addition, any impact the court's decision may have on interstate commerce is merely incidental. The decision merely invalidates a single contract and does not completely banish any commerce from its borders. *See Exxon,* 437 U.S. at 126; *Clover Leaf Creamery,* 449 U.S. at 472-473. Finally, the local benefit strongly outweighs any incidental burden on interstate commerce:

> It is thus an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters. . . .

CTS, 107 S.Ct. at 1651.[13]

To sum, the decision below merely sets forth facially neutral rules for governance of Vermont municipalities and corporations. Vermont has a legitimate interest in setting such rules. Any incidental impingement on interstate commerce fails to rise to the level of "clearly excessive." Therefore, the decision below fully comports with the commerce clause.

Conclusion.

For the reasons set forth above the Court should deny Petitioner's request for a Writ of Certiorari.

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[13] At least one justice would go even further: "[a]s long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes shareholder welfare or industrial stagnation. Beyond that, it is for Congress to prescribe its invalidity." *CTS*, 107 S.Ct. at 1653 (Scalia, J. concurring).

APPENDIX

No. 86-555.
In the Supreme Court
of the State of Vermont

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET. AL.,
PLAINTIFFS-APPELLANTS.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO., ET. AL.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
FOR WASHINGTON COUNTY.

Joint Brief for the Defendants-Appellees.

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A. *Counterclaims, Affirmative Defenses and Related Case.*

The judgment on appeal does not constitute a final judgment in the case, but rather was entered pursuant to V.R.C.P. Rule 54(b), on the claims adjudicated on the cross-motions for summary judgment. The remaining claims, which have not been adjudicated, include the counterclaims of the defendant villages and WEC alleging that they have numerous other power contracts that are substantially the same as those being challenged, and seeking a declaration of validity with respect to all such contracts. Those defendants also asserted a number of affirmative defenses to DPS's claims, including, *inter alia,* waiver, estoppel and res judicata, none of which was decided below. Also, in July 1986, MMWEC brought a separate complaint for declaratory relief against all Vermont participants in its Stony Brook Intermediate Project, including Green Mountain Power Corp. and the Villages of Stowe, Ludlow, Hardwick, Morrisville and Swanton, seeking a determination of the validity of its power sales agreements for that project. *Massachusetts Municipal Wholesale Electric Co.* v. *State of Vermont, et. al.,* Washington Superior Court, Civil Action No., S-301-86 WnC. These contracts (SPC at 616-640) are virtually identical to the contracts challenged in the present case (the principal difference being that power supplied by the Stony Brook Intermediate Project, an oil and natural gas fired generating unit in which MMWEC owns a 90.757 percent interest, is today considered relatively low-cost power). That action is pending in the Superior Court.

B. *Expert Witnesses and Stipulation.*

The cross-motions for summary judgment were heard and determined on a record consisting of an extensive stipulation of facts, together with five volumes of exhibits, and the pre-filed testimony[3] and oral cross-examination of the parties'

[3]Pre-filed testimony was submitted and used by order of the trial court and agreement of the parties.

Statement of Issues.

Since paragraphs 1 through 8 of the DPS's statement of issues (DPS Br. at 18-19) contain incorrect assertions of fact and conclusions of law, the defendants-appellees restate the principal questions presented in more consolidated form:

Under 30 V.S.A. § 4002, as adopted in 1977 by Act 97, expressly authorizing municipal and cooperative electric utilities "to act in participation with other such utilities in arranging for purchase of supplies of capacity and energy from other utilities," within or without Vermont, including "associations of utilities, or public authorities," did the Vermont participants in MMWEC's Project No. 6 have statutory authority in 1979 to contract with MMWEC for a portion of its share of capacity in and energy from a proposed new generating plant?

Do 30 V.S.A. § 604, as amended in 1977 by Acts 275 and 278, applicable to the Village of Lyndonville and the City of Burlington, and 30 V.S.A. §§ 5012 and 5013, applicable to Vermont Public Power Supply Authority, confirm the authority of the municipal and cooperative utilities under § 4002 to contract with MMWEC for a portion of its share of capacity in and energy from a proposed new generating plant?

Did the Project No. 6 PSA's constitute municipal or cooperative indebtedness subject to the provisions of 24 V.S.A. § 1822 or 30 V.S.A. § 108 so that municipal votes or PSB approval, respectively, should have been obtained?

Did the Project No. 6 PSA's constitute a pledge or encumbrance of corporate property subject to the provisions of 30 V.S.A. § 3032 so that votes of the cooperatives' members should have been obtained?

A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18] Certain issues that have been briefed by

[18]These include various state and federal constitutional claims as well as the contention that the PSA's conflict with 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates.

the DPS were not reached by the trial court and need not be reached by this Court if it affirms the judgment below.[19] If this Court does not affirm the judgment, the case should be remanded for determination by the trial court of the issues not previously addressed.

Summary of Argument.

The villages and cooperatives were expressly authorized under 30 V.S.A. § 4002 to enter into the Power Sales Agreements for the purchase of capacity and energy in MMWEC's Project No. 6. Section 4002 explicitly authorizes the purchase of capacity in and energy from existing and proposed electrical generating units. The provisions of 30 V.S.A. §§ 604, 5012 and 5013 are consistent with § 4002 in providing to Vermont utilities the flexibility necessary to obtain long term power supplies through take-or-pay contracts. Decisions involving the Washington Public Power Supply System are irrelevant to the proper construction of § 4002. (pp. 22-44).

The villages were not required to obtain voter approval under 24 V.S.A. § 1822 to enter into the Power Sales Agreements with MMWEC.

The Power Sales Agreements do not constitute a pledge, assignment, or hypothecation of the villages' net revenues, nor are they evidences of indebtedness within the meaning of § 1822. Take-or-pay contracts such as the PSA's at issue here are no more "indebtedness" under § 1822 than they are "indebtedness" for purposes of determining compliance with municipal debt limits under 24 V.S.A. § 1762 (pp. 45-60).

The cooperatives were not required to obtain member approval under 30 V.S.A. § 3032 to enter into the Power Sales Agreements for purchase of capacity and energy from MMWEC's Project No. 6 (pp. 60-62). Nor were the cooperatives required to obtain Public Service Board ap-

[19]These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC.

proval under 30 V.S.A. § 108 to enter into the PSA's (pp. 62-65).

and inequitable to permit successor officials now to revise these decisions of their predecessors.

This Court can, and should, decide this case on the grounds relied on by the trial court. Should it decide not to affirm the decision below, however, the Court should remand the case to permit the trial court to rule on the affirmative defenses asserted by the defendant v [sic] Villages and WEC.

The motion for summary judgment filed by the villages and WEC requested that the court enter summary judgment in their favor on their defenses only if the trial court held one or more of the plaintiffs' theories proper and the contracts invalid. (PC at 326). The trial court therefore did not reach consideration of the factual materials and legal arguments advanced by the parties in connection with the defenses raised by the villages and WEC.[40]

While the rules of decision of the Supreme Court indicate that the court may affirm the decision of the trial court on grounds supporting the trial court's decision whether or not they form the basis of the trial court's decision, a trial court will "not. . .be put in error on a point not made below." *Valenti v. Imperial Assurance Co.*, 107 Vt. 65, 71 (1935). In the first instance, the trial court should rule upon whether the facts in evidence in the Summary Judgment Motion do or do not create a genuine issue of material fact and whether the defenses are sufficient as a matter of law. To do otherwise would require the Supreme Court to conduct the detailed factual and legal analysis of the full record which would usually be conducted by the trial court.

[40]If this Court believes that it needs to be ruled upon, the DPS's argument that the Project No. 6 PSA's are invalid for failure to achieve 100% participation (DPS Br. at 92-95) should also be remanded for initial consideration by the trial court.